In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-609

FEDERAL TRADE COMMISSION, PETITIONER

v.

ADOLPH COORS COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

Respondent Coors has not even attempted to respond to our petition insofar as it challenges the court of appeals' setting aside of Paragraph 12 of the Federal Trade Commission's order, which imposes notice limitations on Coors' right to cancel its distributorship agreements.[1] Nor does Coors dispute that the questions presented by the petition may appropriately be considered independently of Coors' own petition for a writ of certiorari. Coors' response is essentially limited to an argument on the merits as to the portion of the petition

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[1]Coors asserts that the notice requirement of Paragraph 12 is "inextricably tied" to the arbitration provisions of Paragraph 13 (Br. in Opp. 10), but the substance of Paragraph 12, which in fact makes only a passing reference to Paragraph 13, would stand unimpaired even if Paragraph 13 were set aside.

challenging the court of appeals' setting aside of Paragraph 13 of the order, which requires Coors to afford terminated distributors a right to submit specified issues concerning the termination to arbitration.

Coors asserts that Paragraph 13 is invalid—for reasons not relied upon by the court of appeals—because "blanket arbitration provisions requiring arbitration of disputes which might arise in the future to determine whether the antitrust laws have been violated are illegal" (Br. in Opp. 8). The cases on which Coors relies, however, did not involve judicial or administrative orders; they involved contractual arrangements purportedly preventing a potential victim of an antitrust violation from seeking redress in a federal court.[2]

Moreover, the federal courts have rejected claims that antitrust issues can never be submitted to an arbitrator. See, *e.g.*, *Coenen* v. *R. W. Pressprich & Co.*, 453 F. 2d 1209, 1215 (C.A. 2), certiorari denied, 406 U.S. 949 (antitrust claims may be submitted to arbitrator if parties agree to arbitrate after dispute arises). See also *Cobb* v. *Lewis*, 488 F. 2d 41, 47-48 (C.A. 5).

This Court has also recognized that disputes having antitrust implications can be a proper subject for arbitration. In *United States* v. *Paramount Pictures, Inc.*,

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[2]See *Power Replacements, Inc.* v. *Air Preheater Co.*, 426 F. 2d 980, 983 (C.A. 9), quoting from *American Safety Equipment Corp.* v. *J.P. Maguire & Co.*, 391 F. 2d 821, 826 (C.A. 2):

> "A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest."

See also *A. & E. Plastik Pak Co.*, v. *Monsanto Co.*, 396 F. 2d 710, 716 (C.A. 9).

334 U.S. 131, 176, the Court held that a district court has discretion to include a consensual arbitration provision in an antitrust decree as "an auxiliary enforcement procedure," if it does not bar "the use of other remedies the law affords for violations either of the Sherman Act or of the decree of the court." The Commission's arbitration provision does not deny a distributor access to the federal courts; rather, it provides an additional remedy.

In any event, the arbitration provision is not limited to claims that raise antitrust issues. Although the Commission's order provides that cancellation is not made in good faith for the purposes of the order if "the termination would constitute a violation of the antitrust laws or this Order" (Pet. No. 74-128, App. B-6), an arbitrator may also determine whether a termination for "cause" is in fact based upon a "material violation of one or more contract provisions which are relevant to the effective operation of the franchise" (*ibid.*). Submission of such questions to arbitration would not interfere with the jurisdiction of the federal courts over antitrust claims.

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

CALVIN J. COLLIER,
General Counsel,
Federal Trade Commission.

JANUARY 1975.